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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JENA MINOR, Plaintiff and Appellant, v. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B235857 (Los Angeles County Super. Ct. No. BC434669)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Affirmed.

Abel Law Offices and Bruce D. Abel for Plaintiff and Appellant.

Meserve, Mumper & Hughes and Patricia A. Ellis; Metropolitan Water District of Southern California, Marcia L. Scully and Heather C. Beatty for Defendant and Respondent.

Plaintiff and appellant Jena Minor appeals from the summary judgment entered in favor of defendant and respondent Metropolitan Water District of Southern California (MWD) in her action for retaliation in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) Minor argues that certain procedural flaws in MWD's motion for summary judgment mandate its denial and, in any event, she proffered sufficient evidence to raise a triable issue of material fact. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Minor's Employment with MWD*

Minor and MWD have vastly differing views on many events in Minor's employment. Certain facts, however, are not in dispute. Minor began her employment with MWD in 1987. In 2001, Minor filed a complaint[1] alleging sexual harassment by intoxicated MWD board members. In 2002, she entered into a confidential settlement agreement with MWD regarding this complaint. In connection with the settlement agreement, Minor was promoted to Senior Administrative Analyst and transferred to work in MWD's Equal Employment Opportunity office (EEO).

Minor believes that, between 2002 and 2005, MWD retaliated against her for reporting the sexual harassment in 2001. In 2005, she filed a charge of retaliation with the Department of Fair Employment and Housing (DFEH). In August 2005, Minor

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[1] Strictly speaking, Minor may have filed an administrative claim or grievance, instead of an actual complaint.

entered into a second confidential settlement agreement with MWD.[2] Pursuant to this settlement agreement, Minor was transferred to the Training and Organizational Effectiveness unit (TOE).[3] The purpose of the TOE is to organize, design, develop and deliver training courses to MWD employees and customers. It is part of the Human Resources department.

When Minor was transferred to TOE in mid-2005, TOE was managed by Dr. Irwin Jankovic. Dr. Jankovic was informed by his supervisor that Minor was being transferred to TOE and "to find a place for her." Dr. Jankovic knew Minor had skills as a trainer as he had seen her deliver sexual harassment training classes in the past. He believed that Minor could be utilized effectively in TOE, especially with course development.

Minor remained at the Senior Analyst rank. The next highest rank was Principal Analyst. It is undisputed that Minor hoped to promote to the Principal Analyst position.[4]

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[2] The settlement agreement is not part of the record. Minor alleges that, in the settlement agreement, MWD promised that Minor "would be given meaningful work assignments and that her work office would be comparable to the one she had been using." MWD disputes, at the very least, the terms of its promise regarding her office. In any event, Minor did not bring suit against MWD for allegedly breaching this agreement.

[3] TOE was subsequently renamed as the Talent Management Unit. For clarity, we use the acronym "TOE" regardless of the name change.

[4] According to statements in her declaration, Minor believed she was qualified to perform the work of a Principal Analyst at the time she transferred to TOE. However, objections were sustained to these statements.

Dr. Jankovic continued as the manager of TOE, and, therefore, as Minor's supervisor, through February 2008. At that time, MWD's head of Human Resources, Fidencio Mares, transferred Dr. Jankovic to a different position. As there was no immediate replacement available for Dr. Jankovic, Mares became the interim supervisor for all TOE employees, including Minor.

Mares remained the interim supervisor of TOE until October 2008, when Suresh Radhakrishnan became the permanent unit manager of TOE, and Minor's direct supervisor. Minor would eventually allege that all three of her TOE supervisors, Dr. Jankovic, Mares, and Radhakrishnan, retaliated against her for her 2001 sexual harassment complaint and her 2005 DFEH complaint of retaliation.

On November 17, 2008, Minor sent an e-mail to Mares, on which several others, including Radhakrishnan, but not Dr. Jankovic, were copied. The e-mail had the subject line: "Notice of filing of Complaint of Discr[i]mination and Retali[a]tion." In her e-mail, Minor asserted that Mares had discriminated against her on the basis of race[5] and retaliated against her, although the e-mail fails to identify the conduct on Minor's part for which Mares allegedly retaliated. Minor's e-mail states that Mares's allegedly discriminatory and/or retaliatory conduct included the denial of "opportunities for meaningful work," being "openly insulting" to Minor, showing favoritism to Minor's white co-workers,[6] giving Minor's work to white co-workers, promoting only her white

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[5] At no point in the instant action did Minor pursue a claim for racial discrimination.

[6] Minor is African-American.

co-workers, omitting Minor from TOE's website,[7] and assigning Minor a particular office.[8] Minor further stated that she would be going on immediate leave, and that she would be requesting an immediate transfer.[9]

Minor returned from leave in March 2009. On March 23, 2009, Mares and Radhakrishnan met with Minor and her union representative, Miriam Hutchinson, to deliver to Minor a letter which encompassed a written reprimand and Corrective Action Plan (CAP). The reprimand, which MWD would assert was prepared *prior to* Minor's e-mail of November 17, 2008, indicated several flaws in Minor's performance, level of cooperation, and communication with superiors. In addition, the reprimand noted that Minor "failed to meet other basic performance criteria," including the requirements to turn in accurate time sheets and arrive at staff meetings on time. The CAP itself was to run for 90 days. It stated, "In this CAP you will be given specific tasks and projects to perform with specific metrics that have to be met or exceeded within specific timeframes and minimum quality standards." Some of the requirements of the CAP related to specific training courses on which Minor was working; other requirements related to reporting to work on time and promptly reporting unscheduled leave. The CAP indicated that the failure to comply with its requirements "will be grounds for

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[7] As we will later discuss, this reference is to the "IntraMet," an intranet internal to MWD.

[8] As we will later discuss, Minor's cubicle had a pillar in it, while other cubicles did not.

[9] It appears, however, that Minor never requested the transfer. She had previously requested a transfer into a particular department, which was denied.

further disciplinary action, up to and including discharge." The letter also indicated a hope that Minor would comply with the CAP "because it is meant to be constructive and to give you every opportunity to be successful in your current and future career." The letter closed with a statement that Minor could grieve the letter of reprimand pursuant to the grievance procedure agreed upon by her union; there is no indication that Minor ever filed such a grievance.

On April 13, 2009, Minor filed a complaint with the DFEH, alleging that "MWD MANAGEMENT" retaliated against her for having engaged in the protected activity of previously complaining about sexual harassment, gender discrimination, and retaliation. An immediate right-to-sue letter was issued at Minor's request.

Minor remained at work. Throughout the process of her CAP, Minor and her union representative met with Radhakrishnan every two weeks to discuss her progress. Minor was absent from work for two weeks during the CAP period – one week for a training class Radhakrishnan had authorized her to attend, and another to recover from a car accident. The CAP was scheduled to end on June 23, 2009. At the meeting on June 8, 2009, Radhakrishnan informed Minor that he would extend the CAP for 30 days. Radhakrishnan takes the position that he extended the CAP because of Minor's absences. Minor alleges that, instead, Radhakrishnan admitted that he was extending the CAP because he was mad that she had filed an internal grievance against him. It was ultimately agreed to extend the CAP for only two weeks, the length of Minor's absences. At the end of the extension period, Radhakrishnan concluded that Minor had successfully completed the CAP.

On June 23, 2009, Minor filed suit against MWD alleging improper retaliation. However, she subsequently sought to amend her lawsuit to include additional allegations of retaliation purportedly arising after the issuance of her April 2009 right-to-sue letter. Rather than amend, she voluntarily dismissed that action without prejudice in order to file a new action including the subsequent acts of retaliation.

From October through December 2009, Radhakrishnan gave Minor "clerical work" to perform. Minor would subsequently allege that this was retaliatory.

In February 2010, Minor again went on leave from work. She has not returned.

2. *Allegations of the Complaint*

Minor filed the instant action on March 26, 2010.[10] The operative complaint is her first amended complaint, filed on April 2, 2010. It alleges a single cause of action, for retaliation under FEHA, against a single defendant, MWD.

Minor's complaint alleges two different sets of retaliatory acts. First, Minor alleges 10 separate acts as "illustrative of the on-going, continuous adverse employment actions and retaliation" taken against her after the August 2005 settlement, in alleged retaliation for her 2001 complaint of gender discrimination and her 2005 DFEH complaint of retaliation. These acts are: (1) denying Minor the opportunity "to have full time meaningful work despite her repeated written and verbal requests for work"; (2) refusing to let Minor transfer to another division when she had sought a transfer in mid-2008; (3) assigning her to an office with a pillar in it, when better offices were available; (4) ignoring or rejecting her when she developed 30 different courses of her

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[10] She alleged receiving a second right-to-sue letter in October 2009.

own initiative, but giving six of those courses to her co-workers; (5) allowing her to teach only one subject matter when other trainers taught as many as 12; (6) denying her promotions and promotional opportunities; (7) giving her no credit for developing the successful extra-curricular "MWD Idol" event and forbidding her from being further involved with it; (8) subjecting others who complained about illegal employment practices to a similar pattern of retaliation; (9) refusing her a presence on the IntraMet; and (10) repeatedly denying her training and educational opportunities routinely afforded her coworkers.

Second, Minor itemized an additional seven purported acts of retaliation which MWD allegedly performed in retaliation for Minor's June 2009 lawsuit "and earlier written grievances filed with MWD complaining about retaliation."[11] These acts are: (11) unjustly placing her on a CAP and unfairly extending it; (12) attempting to gather only unfavorable information about Minor to defend itself in the June 2009 lawsuit; (13) engaging in a "systematic campaign to belittle" Minor for filing the lawsuit, including mocking her and laughing at her at a meeting attended by her union representative; (14) continuing to refuse to move her to a better office, but giving a better office to Minor's "subordinate"; (15) continuing to refuse to give her a presence on the IntraMet, but giving Minor's "subordinate" such a presence; (16) assigning her to "act as another Analyst's typist and clerk," while no other Senior Analysts have ever

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[11] Minor's complaint does not specifically identify her November 17, 2008 e-mail charging Mares with discrimination and retaliation; however, she would later argue that this e-mail was the protected act which caused MWD to retaliate.

been similarly assigned; and (17) admitting that after the 2005 settlement, MWD did not give her meaningful work assignments.[12]

3. *MWD's Motion for Summary Judgment*

On March 14, 2011, MWD moved for summary judgment, setting a hearing date of May 26, 2011. The motion was personally served on March 11, 2011, providing the requisite 75 days service. (Code Civ. Proc., § 437c, subd. (a).)

MWD's motion argued that Minor could not establish a prima facie case of retaliation for two reasons. First, MWD argued that Minor could not establish that it committed any adverse employment actions. Second, MWD argued that Minor could not establish any causal link between her concededly protected activity and any alleged adverse employment action. Additionally, MWD argued that even if Minor could establish a prima facie case, MWD had legitimate non-retaliatory reasons for all of its actions, and Minor possessed no evidence of pretext.

MWD's motion was supported by declarations of Minor's three TOE supervisors, Dr. Jankovic, Mares, and Radhakrishnan. Each supervisor declared that he did not retaliate against Minor, and, indeed, *had no knowledge* of her prior complaints for which he allegedly acted in retaliation. Additionally, each supervisor explained, at length, either his lack of responsibility for each alleged retaliatory act, his

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[12] Minor originally alleged that MWD also retaliated against her "because she has questioned and complained about MWD spending millions of tax payer dollars to hire consultants to teach courses that are already available on-line for MWD employees and/or that could easily be taught by her or other MWD employees in the Training unit." MWD's motion for summary judgment presented evidence that Minor never complained of misuse of public funds. Minor no longer pursues this allegation.

non-discriminatory reasons for the act, or his utter factual disagreement with Minor's view of events.

MWD also supported its motion with excerpts from Minor's deposition in which she admitted, among other things, that many cubicles in MWD have pillars in them, due to the design of the building. She also admitted that, when she alleged that a "subordinate" received a better office and had an IntraMet presence, that "subordinate" was Kelly Bowen. Bowen, however, was not a subordinate of Minor, but a Senior Analyst, just like Minor.

Finally,[13] MWD supported its motion with excerpts from the deposition of Miriam Hutchinson, Minor's union representative. Hutchinson was present when Radhakrishnan presented the CAP to Minor and when it was extended. Although Minor had alleged that Radhakrishnan admitted that he was extending the CAP because Minor had filed a grievance, Hutchinson testified that Radhakrishnan never made such a statement in her presence. Indeed, Hutchinson does not believe that Minor was retaliated against by anyone.

MWD's separate statement of undisputed facts included 220 facts. However, the version of the document which was filed and served was clearly incomplete. For its first 32 and last 15 facts, it properly identifies evidence in support. However, facts 33 through 47 and 175 through 205 are supported by references to declarations without specific page or line numbers (e.g., "Mares Decl., p. __, Radhakrishnan Decl. p. __"),

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[13] MWD's motion was supported by additional declarations which are not relevant to our disposition of this appeal.

and facts 48 through 174 contain no references to supporting evidence at all. We note that, while this version of MWD's separate statement was clearly inadequate, many of MWD's undisputed material facts are near-direct quotations from its supporting declarations, making the source of the evidence easy to find.[14]

MWD's points and authorities in support of its motion was also somewhat incomplete as, in certain places, rather than citing to particular facts in its separate statement, MWD simply inserted a blank citation to the separate statement.

On March 23, 2011, MWD discovered its mistake. MWD immediately filed a "Notice of Errata" in which it indicated that it had filed, "a 'corrupt' document and that various revisions that were made to the document during its preparation, such as certain references to supporting evidence, were not saved." MWD attached revised versions of its separate statement and points and authorities, with all necessary citations in place. There were no substantive changes made to the points and authorities. As Minor notes on appeal, one new fact was added to MWD's separate statement, and the language of three facts was expanded. None of these changes, however, referred to

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[14] For example, undisputed fact 91 states, "The Finance for Non-Finance Managers course was Plaintiff's key deliverable during Mr. Radhakrishnan's supervision of her. This was an important project that had high-level MWD management support. The development and timely delivery of this four-hour course was of critical importance, given the financial challenges faced by MWD and our managers due to difficult economic times and tight budget constraints." Paragraph 6 of Radhakrishnan's declaration in support begins, "The Finance for Non-Finance Managers course was Ms. Minor's key deliverable during my supervision of her. This was an important project that had high-level MWD management support. The development and timely delivery of this four-hour course was of critical importance, given the financial challenges faced by MWD and our managers due to difficult economic times and tight budget constraints."

evidence which had not been served with the initial motion. Minor made no immediate objection to the notice of errata.

4. *Minor's Opposition*

In her May 12, 2011 opposition to the motion for summary judgment,[15] Minor, for the first time, challenged MWD's notice of errata and revised summary judgment documents. Minor argued that the revised documents constituted a new summary judgment motion which was procedurally deficient as it had not been served 75 days prior to the hearing date. Taking the position that the revised documents should be stricken, Minor then directed all of her attention to the originally-served documents. She therefore argued that MWD's separate statement of undisputed facts was fatally defective, as it failed to provide citations to evidence for the bulk of its facts.[16] While Minor also argued the merits of the motion, her only evidence in support of her opposition was her own declaration, and a few exhibits thereto.[17] Among other things,

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[15] Simultaneous to her motion for summary judgment, plaintiff objected to the notice of errata and moved to strike MWD's revised separate statement and points and authorities.

[16] Indeed, in Minor's opposition to MWD's separate statement, she addressed only the original separate statement, and frequently opposed a fact with the statement, "Disputed. 'Moving party does not cite to any evidence to support its contention.' " Minor opposed many of MWD's facts with this language even though the evidence supporting the contention had been served with the original separate statement and had been identified in the revised separate statement.

[17] A subsequent declaration of MWD's counsel states that, although Minor's counsel originally indicated an intent to depose many MWD employees, and MWD's counsel provided dates for those depositions, Minor subsequently chose to not proceed with any depositions beyond that of Hutchinson. Indeed, an attached e-mail indicates that, on March 12, 2011, the day after Minor was served with the motion for summary

Minor stated in her declaration that she had told all three of her supervisors about her 2001 complaint of sexual harassment. Minor interposed no objections to any of the evidence submitted in support of MWD's summary judgment motion.

5. *Objections and Reply*

MWD interposed 113 objections to Minor's 73-paragraph declaration, many of which were ultimately sustained. In reply in support of its motion, MWD also relied on additional evidence.[18] Among the evidence submitted was an excerpt from Minor's February 22, 2011 deposition, in which Minor was asked, "[A]t the time that you joined TOE, did you ever have any conversations with Mr. Jankovic regarding your prior complaints?" Minor responded, "I doubt that I would have." When asked if she had any recollections of any such conversations, she stated, "No, not that it didn't occur. I just don't have any recollection of it."

6. *Hearing, Ruling and Appeal*

The trial court issued its tentative ruling prior to the May 26, 2011 hearing. The trial court indicated its intent to overrule a handful of MWD's objections to Minor's declaration, sustain the rest, and grant MWD's motion for summary judgment. At the hearing, Minor argued that several tentatively sustained objections to her declaration should be overruled. The trial court agreed to reconsider the declaration and the objections to it. It took the matter under submission.

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judgment, Minor's counsel stated, "We are not going forward with [Radhakrishnan]'s depo, at this time."

[18] Minor never objected to the evidence submitted in support of MWD's reply.

On June 14, 2011, the court issued its order granting summary judgment. The court ultimately overruled many more objections to Minor's declaration than it had originally intended to overrule, but still sustained objections to more than half of the declaration.[19] As to Minor's procedural arguments, the court concluded that Minor had sufficient time to respond to the revised documents in support of MWD's summary judgment motion. On the merits, the court concluded that, with respect to each adverse employment action alleged by Minor, it either did not occur or there was no evidence it was retaliatory. Judgment was entered accordingly. Minor filed a timely notice of appeal.

CONTENTIONS ON APPEAL

On appeal, Minor contends summary judgment should have been denied because: (1) she was denied due process in that the hearing was not held 75 days after the notice of errata was served; (2) MWD's initial separate statement was fatally defective; (3) certain objections to her declaration should not have been sustained; (4) triable issues of fact exist; and (5) MWD's motion failed to address several material allegations of her complaint. We disagree and affirm.

DISCUSSION

1. *Standard of Review*

"The policy underlying motions for summary judgment and summary adjudication of issues is to ' "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." ' " (*Hood v. Superior Court*

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[19] Of its 73 paragraphs, 22 remain in whole and another 12 remain in part.

(1995) 33 Cal.App.4th 319, 323.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.)

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) The motion and the opposition to the motion "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Id*., subd. (b)(1).) Separate statements setting forth plainly and concisely all material facts which the parties contend are undisputed must be included. (*Ibid*.) "Evidentiary objections not made at the hearing shall be deemed waived." (*Id*., subd. (b)(5).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence . . . and all inferences reasonably deducible from the evidence, except summary judgment may not be granted . . . on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (*Id*., subd. (c); *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

A defendant or cross-defendant meets his or her burden upon a motion for summary judgment or summary adjudication if that party has proved "one or more elements of the cause of action . . . cannot be established, or that there is a complete

defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) The defendant need not conclusively negate an element of the plaintiff's cause of action, but must only show that one or more of its elements cannot be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

"Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists . . . . " (Code Civ. Proc., § 437c, subd. (p)(2).) In opposing the motion, the plaintiff or cross-complainant may not simply rely upon allegations or denials of the pleadings; the plaintiff or cross-complainant must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581, 593.) "In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party. [Citations.] 'In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible, or evasive. [Citation.]' [Citation.] The rule is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness." (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.)

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.)

On appeal, we exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co*. (1993) 14 Cal.App.4th 16, 19; accord, *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686-1687.)

2. *Minor was Not Denied Due Process*

Code of Civil Procedure section 437c, subdivision (a) provides that notice of a summary judgment motion "and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing," with an additional five days if served by mail. Absent the consent of the parties, a trial court does not have the authority to shorten the minimum notice period for the hearing of a summary judgment motion. (*McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 114.) Minor argues that she was denied due process in that the notice of errata "essentially amounted to a wholly new" motion for summary judgment, which was served, by mail, on March 23, 2011, some 64, rather than 80, days prior to the hearing.

We disagree with Minor's premise; the notice of errata did not amount to a wholly new motion for summary judgment. The legal arguments in support of the motion were *exactly the same*, both before and after the notice of errata. More

importantly, the evidence submitted in support of the motion was also exactly the same. MWD added no new arguments to which Minor was required to respond, and added no new evidence which Minor was required to address. Indeed, to the extent the facts in MWD's separate statement changed, the changes were truly de minimis.[20] While we agree that MWD's originally-served documents were, as MWD put it, "corrupt,"[21] MWD's prompt attempt to correct the documents did not result in a new motion for summary judgment which required the statutory service period to begin anew.

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[20] In its original undisputed fact 69, MWD stated, "At one point during Dr. Jankovic's supervision of Plaintiff, she requested that he move work away from others in TOE and reassign it to her. Dr. Jankovic did not view reassigning work in this manner as appropriate." In its revised separate statement, MWD simply added an explanation as to why Dr. Jankovic viewed reassignment as inappropriate. In its original undisputed fact 78, MWD stated that Mares believed Minor should have been able to develop her Finance for Non-Finance Managers course in four months. In its revised separate statement, MWD added that Mares encouraged Minor to take advantage of the existence of similar courses, so that she would not have to put the course together from scratch. In its original undisputed fact 193, MWD stated that Mares denied Minor's request to attend a conference in Chicago because it did not focus on training, which was TOE's focus. In its revised separate statement, MWD added the Mares was unaware of any *training* conference denied to Minor but afforded her co-workers. While this is an arguably material modification, Minor stated it was "[u]ndisputed" that during the time that Mares was her supervisor, Mares only declined a single one of Minor's requests for training – the Chicago conference. Thus, Minor effectively concedes the point. The single new fact appearing in the revised separate statement is "Mares has no involvement in determining which MWD employees appear on the MWD IntraMet," a fact which is ultimately unnecessary to our conclusion.

[21] MWD is not the only party which unintentionally filed versions of documents which were not ready for filing. In Minor's objection to MWD's notice of errata, one italicized quotation from a case is followed by the text, "(Do you want to add emphasis?)" while another is followed by "Need cite." In the midst of its argument, the following parenthetical appears: "(I'm confused about the citation above. We will need to fix it.)" Clearly, both parties' submissions could have been improved by an additional round of proofreading.

Moreover, we find it significant that: (1) Minor never sought additional time from the court in which to prepare her opposition, in order to respond to the revised documents; and (2) Minor never argued, before the trial court or this court, that she was prejudiced by the service of the errata without an accompanying extension of time for her to oppose the summary judgment motion. In her brief on appeal, Minor argues only that she "was deprived of 17 days" to prepare and serve her opposition; she makes no argument that her remaining time was insufficient, or that she had even begun to prepare her opposition prior to receiving the notice of errata. Under these circumstances, where Minor asserts no prejudice and any prejudice clearly could have been cured had she sought an extension, we conclude there was no due process violation.

3. *Minor Improperly Relied on the Original Separate Statement*

While Minor objected to the notice of errata and requested that the revised separate statement and points and authorities be stricken, Minor declined to address the possibility that her request to strike might be denied. Thus, in her opposition to the motion for summary judgment, she argued that the original separate statement was fatally defective, and completely ignored the revised separate statement.

On appeal, Minor again argues that the original separate statement was fatally defective and therefore the motion should have been denied. She is mistaken. Code of Civil Procedure section 437c, subdivision (b)(1) provides that a motion for summary judgment must be supported by a separate statement in which each material fact contended to be undisputed "shall be followed by a reference to the supporting

evidence." But that subdivision also provides that "[t]he failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." In other words, a defect in the separate statement *may* support denial of a summary judgment motion, but does not require it.

While earlier authority has suggested a "golden rule" that if something is not in the separate statement, it does not exist (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337),[22] more recent authority has taken a less stringent approach, recognizing the discretion provided by the statutory language. (*Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1477-1478.) Such cases have held that a trial court possesses discretion to overlook procedural errors in summary judgment papers if the evidence and circumstances warrant it. (*Id*. at p. 1478; *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1481.)

In considering whether to exercise its discretion to consider evidence which was not referenced in the separate statement, a court should consider the following issues: whether the facts are relatively simple; whether the evidence was clearly called to the attention of the court and counsel; whether the result is fairly obvious; and whether the opposing party was fully advised of the issues to be addressed and given adequate notice of the facts it must rebut in order to prevail. (*Fenn v. Sherriff, supra,* 109 Cal.App.4th at p. 1481.) We need not consider these factors, however, because the issue before us is not whether the trial court abused its discretion in considering all of

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[22] We note that the so-called "golden rule" and the case which discussed it were concerned with whether a *fact* was present in the separate statement, not with whether *evidence* supporting that fact was identified in the separate statement.

the evidence MWD submitted despite its failure to include citations to the evidence in its initial separate statement. Instead, the issue before us is whether the court abused its discretion in considering all of the evidence MWD submitted *in light of the fact that MWD promptly revised its separate statement to properly include citations to all of the relevant evidence*. The court, and Minor, were, by the revised separate statement, fully informed of the evidence supporting the facts on which MWD sought to rely, thus eliminating any possibility of harm arising from the court's consideration of the evidence not identified in the initial separate statement. That Minor chose to disregard MWD's revised separate statement does not mandate the conclusion that the trial court erred in not doing so as well.

4. *Minor Has Waived the Challenges to the Objections to Her Declaration*

Before we consider to the merits of the summary judgment motion, we consider Minor's argument that several objections to her declaration were improperly sustained. In her brief on appeal, Minor contends that the court erred in sustaining objections to nine different paragraphs of her complaint.[23] However, she makes no argument whatsoever as to seven of these objections, preferring instead to simply raise two "example[s]" of rulings she believes were erroneous. When a party presents neither

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[23] In response, MWD states that two of these objections were, in fact, overruled. MWD is in error, apparently confusing *objection numbers* with *paragraph* numbers. Specifically, Minor challenges the court's ruling sustaining objections to paragraph 61 and lines 10 and 11 of paragraph 69 of her declaration. MWD states that these objections were overruled. The objection to paragraph 61 is objection number 95; the objection to the identified lines of paragraph 69 is objection number 106. The trial court's ruling does not identify objections 95 and 106 in its list of overruled objections, and states that all other objections are sustained.

argument nor authority suggesting the trial court's evidentiary rulings were erroneous, we disregard the evidence to which objections were sustained. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108, fn. 5.) We therefore disregard any contention that the seven objections which are merely enumerated as improperly sustained were, in fact, improperly sustained.

The two objections which Minor addresses meet the same fate. Minor argues it was an abuse of discretion to sustain an objection to paragraph 24 of her declaration. Her argument is simply that if the statement were admitted into evidence, it would provide further evidence to support her case. MWD objected to the statement on the ground that it was conclusory; Minor fails to address this evidentiary argument.[24] Similarly, Minor argues that it was an abuse of discretion to sustain an objection to lines 18-20 of paragraph 9, arguing that a proper foundation was laid for the evidence. But MWD had objected to the statement not merely for a lack of foundation, but also on the bases that it was inadmissible speculation, inadmissible subjective opinion, and an

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[24] In any event, the statement is irrelevant. Minor's declaration stated, "The CAP ended with me asserting that the CAP was not justified and was another form of ongoing retaliation for having complained about unlawful retaliation." Minor argues that this statement, "would evidence another instance of [Minor] engaging in protected activity close on proximity to adverse employment actions by MWD." We fail to see the relevance. Preliminarily it is unclear as to the time to which this statement refers – is "[t]he CAP end[ing]" a reference to the meeting where Minor was placed on the CAP in March 2009 or a reference to the June 2009 meeting when it was determined that Minor successfully completed the CAP? In any event, it is undisputed that Minor engaged in protected acts in November 2008 (when she accused Mares of discrimination and retaliation before going on leave) April 2009 (when she filed her DFEH charge) and June 2009 (when she first filed suit). An additional protected act in this time period would add little.

inadmissible contradiction of Minor's deposition testimony. Minor's failure to address any of these arguments waives her contention on appeal.[25]

As Minor has failed to provide argument and authority for the proposition that any of the objections to her declaration were improperly sustained, we reject her contention. We therefore do not consider any evidence to which objections were sustained.

5. *Summary Judgment was Appropriately Granted*

a. *The Shifting Burden in Retaliation Cases*

FEHA prohibits retaliatory employment practices. It is an unlawful "[f]or any employer . . . or person to . . . discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).)

The courts have adopted a three-stage burden-shifting test for trying claims of retaliation. The plaintiff initially has the burden to "show: (1) [plaintiff] engaged in

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[25] Moreover, the objections were properly sustained. In paragraph 9, Minor stated that most of the work the Principal Analysts in TOE performed fit within the job description of a Senior Analyst, and that she therefore could have been doing all of the work that the Principal Analysts in TOE performed. MWD's objection was sustained as to this conclusion. Minor argues that she laid a proper foundation for her conclusion in her statements that she is familiar with the job descriptions for Senior Analyst and Principal Analyst and that she "periodically viewed the assignments of other employees in TOE." But simply "periodically view[ing]" another's work assignments is an insufficient basis on which to conclude that the other person's work fits within a particular job description. Minor's further conclusion that she could perform the job of a TOE Principal Analyst, based, again, solely on periodically viewing the assignments of TOE Principal Analysts, is wholly speculative.

a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. (Citation.)" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

On a defense motion for summary judgment in a burden-shifting case, the defendant must show that one of the elements of a prima facie case cannot be established or show the existence of a legitimate reason for the adverse employment action. (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1379.) In this case, MWD attempted to do both.

As to the elements of a prima facie case, MWD challenged the second and third elements. The second, the existence of an adverse employment action, is judged by "the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment . . . . " (*Yanowitz v. L'Oreal USA, Inc., supra*, 36 Cal.4th at p. 1036.) "[I]n determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances . . . . " (*Ibid.*) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset

an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [FEHA]." (*Id*. at pp. 1054-1055.)

The third element of a prima facie case requires a causal link between the protected activity and the employer's adverse actions. Temporal proximity between the protected activity and the adverse action may be sufficient to establish this element. (*Loggins v. Kaiser Permanente Internat., supra,* 151 Cal.App.4th 1102, 1112.) However, to infer such a causal nexus from temporal proximity alone, the employer's adverse action must follow the protected activity within a relatively short time. (*Id*. at p. 1110, fn. 6.) However, a lengthy period between protected activity and adverse action is not necessarily fatal to the plaintiff's prima facie case. "[I]f between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421.) " 'Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70.) Without evidence that the individuals performing the adverse acts were aware of the protected activity, "the causal link necessary for a claim of retaliation can not be established." (*Id*. at p. 73.)

In this case, in addition to challenging the evidence of a prima facie case, MWD also offered non-retaliatory reasons for its purported adverse employment actions. If the defendant demonstrates the existence of a non-retaliatory reason for the adverse employment action, the plaintiff is then required "to provide substantial responsive evidence from which a trier of fact could conclude [defendant's] articulated reasons for the [adverse] employment [action] were pretextual." (*Loggins v. Kaiser Permanente Internat., supra,* 151 Cal.App.4th at p. 1111.) "An employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at p. 75.) " '[A]n employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact.' [Citation.]" (*Id.* at p. 76.)

With the guiding law thus established, we turn to the allegations of Minor's complaint. According to Minor's complaint, she suffered two periods of improper retaliation: first, the period from her August 2005 settlement to her November 17, 2008 e-mail, during which she was allegedly retaliated against for the protected acts of complaining about sexual harassment in 2001 and complaining about retaliation in 2005; second, the period following her November 17, 2008 e-mail, during which she

was allegedly retaliated against for the protected act of sending the e-mail itself, as well as her subsequent DFEH complaint and lawsuit. We consider the two periods separately.

b. *No Actionable Retaliation Prior to November 17, 2008*

Minor's complaint alleges ten acts of retaliation purportedly committed by her three supervisors prior to November 17, 2008.[26] Within that period, we first turn our attention to retaliatory acts purportedly committed by her first supervisor, Dr. Jankovic, between August 2005 and February 2008.

With respect to Dr. Jankovic, MWD argued that Minor could not establish a prima facie case because, among other reasons, MWD could not establish a nexus between her protected acts of complaining about sexual harassment and retaliation and Dr. Jankovic's purported adverse employment actions. This was because Dr. Jankovic had no knowledge of Minor's 2001 and 2005 complaints, and there can be no causal link without such knowledge. MWD relied on Dr. Jankovic's own declaration that he was unaware of the reason Minor was transferred to TOE and that he was unaware that

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[26] As noted above, those acts are: (1) denying Minor the opportunity "to have full time meaningful work despite her repeated written and verbal requests for work"; (2) refusing to let Minor transfer to another division when she had sought a transfer in mid-2008; (3) assigning her to an office with a pillar in it, when better offices were available; (4) ignoring or rejecting her when she developed 30 different courses of her own initiative, but giving six of those courses to her co-workers; (5) allowing her to teach only one subject matter when other trainers taught as many as 12; (6) denying her promotions and promotional opportunities; (7) giving her no credit for developing the successful extra-curricular "MWD Idol" event and forbidding her from being further involved with it; (8) subjecting others who complained about illegal employment practices to a similar pattern of retaliation; (9) refusing her a presence on the IntraMet; and (10) repeatedly denying her training and educational opportunities routinely afforded her coworkers.

she had made any prior complaint of sexual harassment. In opposition, Minor submitted her declaration stating, "[W]hen I started working with [Dr.] Jankovic I told him about the sexual harassment by a MWD Board member and there was a settlement agreement and I ended up in the EEO office but that did not turn out well." Yet this declaration is wholly contradicted by Minor's deposition testimony, some three months earlier, in which she testified that she "doubt[s] that [she] would have" had any conversation with Jankovic regarding her prior complaints when she joined TOE, and that she had no recollection of any such conversation. Minor's self-serving declaration in which she contradicts her deposition testimony and offers no explanation for this sudden change in recall is simply insufficient to create a triable issue of fact. Thus, it has been established that Dr. Jankovic was unaware of Minor's complaints, and therefore could not possibly have acted in retaliation for them.

But if Dr. Jankovic did not retaliate against Minor for the 2001 and 2005 complaints, Mares and Radhakrishnan could not have done so either. This is so because any adverse employment acts taken by Mares and Radhakrishnan could not have been taken until 2008, when they began supervising Minor, and there is no nexus between the complaints (in 2001 and 2005) and the alleged adverse acts (in 2008). Certainly, there is no temporal proximity between the complaints and the acts, which are over two years apart. Conceivably, Minor could have established a temporal proximity had there been a continuous course of retaliatory conduct dating from August 2005 onward. However, as Dr. Jankovic did not retaliate against Minor, any temporal connection was broken during his period of supervision. Thus, MWD defeated Minor's prima facie showing of

retaliation with respect to the 2001 and 2005 complaints, and Minor has failed to raise a triable issue of fact to the contrary.

c. *No Actionable Retaliation After November 17, 2008*

We now turn to the issue of whether MWD was entitled to summary judgment on Minor's complaint to the extent it relies on acts allegedly performed in retaliation for her November 17, 2008 complaint of discrimination and retaliation. As our analysis is somewhat different for each alleged adverse employment action, we consider those actions individually.[27]

(1) *The CAP*

Minor first alleges that she was unjustly placed on a CAP and it was unfairly extended, both in retaliation for her November 17, 2008 e-mail. As to being placed on the CAP, Minor cannot establish causation, because MWD produced evidence that, although Minor was not placed on the CAP until she returned to work in March 2009, Mares and Radhakrishnan had actually planned to place her on the CAP *prior* to her November 17, 2008 e-mail. Specifically, MWD relied on a November 10, 2008 e-mail from Radhakrishnan to Mares, and copied to several others, with the subject line

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[27] We consider the acts of alleged retaliation during this time period as itemized in Minor's complaint, modified to the extent Minor no longer pursues certain allegations on appeal. In her brief on appeal, Minor argues that she suffered certain adverse employment actions which were *not* alleged in her complaint, including that she was never promoted or given a merit pay increase. Similarly, she argues on appeal that MWD refused to transfer her out of TOE "after she complained in November 2008," but, in her complaint, she alleged the refusal to transfer her was an act of retaliation for her 2001 and 2005 complaints, not an act in retaliation for her November 17, 2008 e-mail. As the pleadings define the issues on summary judgment, Minor cannot pursue the adverse acts which she never pleaded.

"Interim Performance Appraisal – JMinor10Nov08 CAP Draft.docx" and transmitting a draft document. In the text of the e-mail, Radhakrishnan asks, "Should specific instances of questioning instructions and being late to meetings be called out in the memo? Or attach samples of a few of the emails? Pse [sic] advise . . . from an adequate documentation and being specific in 'behaviors to correct' standpoint." This evidence establishes that the CAP was intended prior to Minor's November 17, 2008 e-mail, and therefore could not have been in retaliation for the e-mail.

In response, Minor notes that the attached document is apparently called "Interim Performance Appraisal," and suggests that it was something other than the letter of reprimand and CAP that was ultimately given to her. However, the message line itself clearly states "CAP." Minor makes no argument that an employee would be placed on a CAP as part of a *positive* performance appraisal; the essence of a CAP is that the employee's performance needs to be corrected. Minor also argues that the language in the CAP is contradicted by her prior performance evaluations. The issue, however, is not whether the CAP was justified, but whether it was issued in retaliation for the November 17, 2008 e-mail. Clearly, it was not.

Minor also alleges that the extension of the CAP for two weeks in June 2009 was retaliatory. Minor fails to raise a triable issue of fact that the extension was an adverse employment action. MWD presented evidence that the extension was for Minor's benefit; she would not have passed the CAP had it ended when originally scheduled, but the extension allowed her to complete all necessary tasks and she ultimately passed it.

Minor presented no admissible evidence to the contrary.[28] Thus, as there is no evidence that the two-week extension of the CAP negatively affected the terms and conditions of her employment, it was not an adverse employment action and was not retaliatory.

(2) *Attempting to Gather Unfavorable Information*

Second, Minor alleged that, after MWD learned of the June 2009 lawsuit, it "attempted to gather only unfavorable information about [her] to defend itself." The allegation goes on to state that MWD "was frustrated in that effort because the information received from other MWD employees about [Minor] was favorable." Minor argues that summary judgment should have been denied because MWD did not address this allegation in its motion. We conclude, however, that the allegation is immaterial – even if it were true, as we must assume it is due to MWD's failure to address it, it would not support a judgment in favor of Minor.

An attempt to gather unfavorable information – particularly one which resulted in the gathering of favorable information – is not an adverse employment action, as it has no effect on the terms and conditions of employment. In *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1059, an attempt to gather unfavorable information was held to be part of a continuing course of retaliatory conduct. In that case, however, the

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[28] In plaintiff's complaint, she had alleged that, when the CAP was extended, Radhakrishnan admitted to her, in front of Hutchinson, that he was extending the CAP because he was mad at her for filing an internal grievance against him. Both Radhakrishnan and Hutchinson denied such a statement. In Minor's declaration in opposition to the summary judgment motion, she does *not* assert that Radhakrishnan made such a statement. At most, Minor stated that the extension of the CAP was to "punish[]" her for attending a conference Radhakrishnan had allowed her to attend. An objection was sustained to this statement.

employer solicited negative information *from the plaintiff's subordinates*, and encouraged the subordinates to persuade others to come forward with problems they had with the plaintiff. (*Id*. at p. 1060.) These contacts "only could have the effect of undermining [plaintiff's] effectiveness [as a manager]" and therefore placed her career in jeopardy. In contrast, Minor has failed to allege that MWD's attempt to gather evidence to defend itself against her June 2009 lawsuit *in any way* effected her ability to work with subordinates, managers, or coworkers. It therefore had no effect on the terms and conditions of her employment, and is immaterial to Minor's retaliation action.[29]

(3) *Mocking Minor and Calling Her a "Bunch of Noise"*

In her complaint, Minor alleged that MWD management "engaged in a systematic campaign to belittle [Minor] for having filed the June 2009 Lawsuit. For example, [Minor]'s supervisor and another manager mocked and laughed at [Minor] during a meeting with [Minor] to discuss her complaints about retaliation. . . . This mocking and derisive behavior was observed by [Minor]'s [u]nion [r]epresentative who was at the meeting." Although Minor's complaint initially alleged a "systematic campaign," by the time of her opening brief, she argued only that, at a meeting attended by Hutchinson, Radhakrishnan "purposely humiliated [Minor] by yelling and pointing

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[29] In her brief on appeal, Minor argues that, after she filed her lawsuit, Radhakrishnan and Mares also began "monitoring her whereabouts and assigned people to watch her." This was not alleged in Minor's complaint; therefore, MWD was not required to address it.

his finger at her, and insulting her by exclaiming she was a 'bunch of noise.' " There is a triable issue of fact as to whether Radhakrishnan behaved in this manner.[30]

However, even if Radhakrishnan behaved as Minor asserts he did, this does not constitute an adverse employment action. Minor is no longer pursuing an allegation of a systematic campaign to belittle her for filing a lawsuit, but a single instance in which her supervisor behaved insultingly. A mere offensive utterance, however, does not materially affect the terms, conditions or privileges of employment. (*Jones v. Department of Corrections & Rehabilitation, supra,* 152 Cal.App.4th at p. 1381.)

(4) *Minor's Cubicle*

In October 2008, prior to Minor's November 2008 e-mail, the TOE moved office space. Minor wrote to Mares, indicating that she would prefer a window cubicle. Mares was not assigning offices; the task fell to Radhakrishnan. The window cubicles had already been assigned to Radhakrishnan himself (the unit manager) and Dr. Charbonneau, a Principal Analyst. Minor does not contend that she should have been assigned a window cubicle.

However, Minor was assigned a cubicle which had a pillar in it. According to Mares and Radhakrishnan, Minor's cubicle is actually larger than all of the other TOE

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[30] Hutchinson testified that Radhakrishnan raised his voice at Minor, but she would not characterize it as yelling. Radhakrishnan denied pointing his finger in Minor's face or yelling at her. He also testified that, at a meeting in April 2009, he told Minor that a list of classes she had proposed appeared to him to be " 'a lot of noise' that did not pertain to TOE's purpose, or words to that effect." In plaintiff's declaration, she agreed that Radhakrishnan had called her presentation a " 'bunch of noise.' " She went on to state, however, that she had "replied, 'So, I'm a bunch of noise?' And, Mr. Radh[a]krishnan said 'Yes, you are.' And in that same conversation he yelled at me and pointed his finger in my face."

cubicles, except the window cubicles. Indeed, Radhakrishnan testified that he assigned her that cubicle because he thought Minor would want the extra space. Minor, however, testified that her cubicle "has less useable space than other offices in TOE." She believed that there were two larger cubicles, without pillars, which were vacant, to which she should have been moved. Minor testified that her manager refused to move her to the larger offices, which were instead used for storage.

Minor alleged that the refusal to move her to a larger office was taken "to further humiliate and antagonize [her] for having [filed] the June 2009 Lawsuit."[31] However, it is undisputed that the offices were assigned in October 2008, eight months *prior* to the lawsuit; her office assignment – and the first eight months of refusing to reassign her – therefore could not possibly have been in retaliation for filing the lawsuit. Minor's inference that, once she had filed her lawsuit, the *continued* failure to reassign her cubicle was retaliatory is nothing but sheer speculation. An ongoing act which did not initially have a retaliatory motive is not transformed into a retaliatory act by the mere intervening occurrence of protected activity.[32]

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[31] Minor specifically alleged that the refusal to move her to a better cubicle was taken in retaliation for filing her June 2009 lawsuit; she did not allege that it was in retaliation for sending her November 17, 2008 e-mail.

[32] Minor alleged, however, that, subsequent to the filing of her lawsuit, MWD "gave a window office to [Minor's] subordinate, who had just joined [Minor's] group." This was proven to be factually untrue. First, the only window offices were occupied by Radhakrishnan and Dr. Charbonneau, Minor's superiors. Second, the so-called subordinate to whom Minor referred was Kelley Bowen, another Senior Analyst. Minor no longer pursues this argument.

In any event, the assignment to a cubicle with a pillar in it cannot constitute an adverse employment action. MWD presented evidence that there are many cubicles with pillars at MWD. Hutchinson had previously occupied a cubicle with a pillar in it. Indeed, the previous occupant of Minor's cubicle was a person with a position senior to Minor's. The cubicle might not have been Minor's ideal workspace, but assignment to it did not materially affect the terms, conditions or privileges of her employment.

(5) *The IntraMet*

The IntraMet is MWD's private intranet. Minor alleged that presence on the IntraMet is key for someone in her position, a trainer, because other MWD employees seek out trainers and learn of classes via the IntraMet. She alleged that she was denied a presence on the IntraMet to isolate her from the rest of the company and deny her meaningful work.

As with her complaint regarding her office, Minor alleges that she was initially denied a listing on the IntraMet in 2005, and that the continued refusal to list her after November 2008 was retaliatory. We have already determined that no acts prior to November 2008 were retaliatory. As such, the first three years of Minor being denied an IntraMet presence were non-retaliatory, and Minor has nothing but speculation to support her assertion that the later continued denial was somehow retaliatory.

Moreover, even if Minor could establish a prima face case that this denial was retaliatory, MWD introduced evidence of a legitimate, non-retaliatory reason for Minor's failure to have an IntraMet listing. According to MWD, inclusion on the IntraMet "was based on each individual's role as the point of contact for different

training subject areas. These subject areas were determined before [Minor] joined TOE in 2005. Insofar as [Minor] did not have lead responsibility for any subject areas that were already launched, her name was not included on the IntraMet." Minor offered no admissible evidence to the contrary.[33] As such, Minor failed to raise a triable issue of fact as to whether MWD's explanation was pretextual.

(6) *Assigning Minor to Clerical Work*

Minor alleged that, in retaliation for her lawsuit in June 2009, Radhakrishnan assigned her "to act as another Analyst's typist and clerk." Minor alleged that this was demeaning because "a Senior Analyst, such as herself, had never been assigned to be another Analyst's clerk and typist . . . [as opposed to] performing job responsibilities consistent with her job description."

In its motion for summary judgment, Radhakrishnan did not deny that Minor had been asked to assist with such work. He did, however, offer a non-retaliatory explanation for the assignment. He stated that Minor was requested to assist Dr. Charbonneau, a Principal Analyst, with some vendor request forms, because Dr. Charbonneau was very busy. According to Radhakrishnan, Dr. Charbonneau has

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[33] Minor argues, in her brief on appeal, that "MWD craftily explained [that she] was not a 'contact person,' despite the fact that all the other members of TOE, even a subordinate, were designated 'contact persons' with website presence; and, it is MWD that decides who are 'contact persons.' " However, this is not what Minor alleged. Minor alleged that she was denied an IntraMet presence as a "trainer." MWD presented undisputed evidence that not all trainers have IntraMet presence. Indeed, Minor initially pleaded that her "new subordinate" was given IntraMet presence. But this so-called subordinate was Bowen, another Senior Analyst. More importantly, the undisputed evidence indicated that, although Bowen had an IntraMet presence, it was as a contact person for an internship program she had created; she "does not have a presence on the IntraMet related to her training course work in TOE."

asked others in TOE for similar help. Minor offered no admissible evidence to contradict this explanation.[34] Thus, Minor failed to raise a triable issue of fact as to whether MWD's explanation was pretextual.

(7) *Admission of Non-Meaningful Work Assignments*

Minor alleged that, as an act in retaliation for her November 17, 2008 e-mail, MWD management "admitted that after the 2005 settlement of [Minor]'s claims of retaliation, it intentionally did not give [her] meaningful work assignments." This allegation is not an allegation of an act in retaliation for her November 17, 2008 e-mail, but an allegation of evidence which could conceivably support a claim for breach of the August 2005 settlement agreement.[35]

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[34] Minor stated in her declaration, "To my knowledge, I am the only Senior Administrative Analyst ever instructed to type up forms for another analyst as an ongoing assignment." An objection was sustained to this statement, and Minor does not challenge that ruling on appeal.

[35] To the extent Minor argues that, in retaliation for her November 17, 2008 e-mail, she was not given meaningful work assignments, we note that the failure to receive "meaningful" assignments is not an adverse employment action. "Not every change in the conditions of employment . . . constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." . . . " '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' . . . If every minor change in working conditions or trivial action were a materially adverse action then any 'action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' . . . " . . . The plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment' [Citations.]" (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357-358.) Every job has its less-than-meaningful elements; without evidence that the work assigned to Minor involved less pay and benefits, or fewer promotional opportunities, it is simply not actionable as an adverse employment action. (*Id.* at p. 358.)

d. *Conclusion on Summary Judgment*

In sum, MWD met its burden on summary judgment. As to the alleged acts of retaliation for Minor's 2001 and 2005 complaints, MWD established that the acts could not have been retaliatory. As to the alleged acts of retaliation for Minor's November 17, 2008 e-mail and subsequent events, MWD established that the acts either did not constitute adverse employment actions, or were performed for non-retaliatory reasons. As Minor proffered no admissible evidence raising a triable issue of material fact on any of these issues, the motion for summary judgment was appropriately granted.

6. *MWD's Motion Did Not Fail to Address Material Allegations of Minor's Complaint*

Minor next argues that the burden on summary judgment never shifted to her as MWD failed to address certain material allegations in her complaint. While we agree that the pleadings define the scope of the issues on summary judgment, with disagree with Minor's argument that the allegations not addressed by MWD's motion were, in fact, material.

Minor's brief identifies six[36] different purported allegations in her complaint which she believes were material and therefore should have been addressed. We discuss each allegation briefly.

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[36] Minor's brief twice argues that five material allegations were overlooked in MWD's motion for summary judgment. However, the list of allegations changes between her first and second enumerations of the five, resulting in six separate allegations.

First, Minor identifies her purported allegation that MWD engaged in a systematic pattern of retaliation against her. The record citation for this allegation is that part of Minor's first amended complaint in which she alleged, "The June 2009 Lawsuit asserted that MWD had been . . . engaging in systematic retaliation against plaintiff as set forth in part in paragraph 14 of this complaint [which identifies the ten alleged acts of retaliation occurring prior to her April 2009 DFEH complaint]." This allegation simply refers to Minor's earlier lawsuit as a protected act for which she claims MWD subsequently retaliated. As MWD did not challenge the assertion that the 2009 complaint constituted a protected act (but instead challenged the allegation that MWD retaliated against Minor for that act) MWD was not required to address this allegation in its summary judgment motion. In any event, as discussed above, MWD defeated Minor's allegations that MWD retaliated against her by means of the ten enumerated acts.

Second, Minor identifies her allegation that the acts of retaliation taken against her were the same types of retaliatory acts taken against others who engage in protected activity. But Minor did not allege a class action; at issue is not whether MWD retaliated against others, but whether it retaliated against Minor. If MWD established, as it did on summary judgment, that Minor was not retaliated against, the issue of whether it retaliated against anyone else would be wholly immaterial.[37]

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[37] We do not dispute the fact that, in some circumstances, *evidence* of similar improper treatment of similarly situated individuals may give rise to an inference of a discriminatory motive. (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 112; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740,

Third, Minor identifies her allegation that MWD paid her money to settle her claim of sexual harassment in 2001. The allegation is wholly immaterial. That Minor was paid to settle her 2001 sexual harassment claim is certainly not alleged as an act of retaliation itself. It appears that Minor seeks to rely on the settlement payment to establish that there was merit to her 2001 complaint. But a settlement is inadmissible to prove liability for the underlying claim. (Evid. Code § 1152, subd. (a).) In any event, as it is conceded that Minor's 2001 complaint is a protected act, whether her complaint was meritorious is irrelevant.

Fourth, Minor identifies her allegation that MWD attempted to gather unfavorable information about her. We have discussed this issue above.

Fifth, Minor identifies her allegation that, as part of the August 2005 settlement of her retaliation claim, MWD promised to give her "meaningful work assignments." Minor is not suing for breach of the settlement agreement, she is suing for retaliation. Thus, any promises made to Minor in her settlement agreement are immaterial.

Sixth, Minor identifies her allegation that she attempted to resolve her grievances through MWD's internal grievance process and MWD failed to provide relief. The sentence in which this allegation appears in Minor's complaint, however, refers to her

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745, 767.) That is to say, Minor perhaps could have opposed summary judgment with evidence that others who complained of discrimination were similarly treated, in order to challenge MWD's evidence of non-retaliatory motives for its alleged adverse employment actions. She did not do so. MWD was not, however, required to prove that it did not retaliate against anyone else when the only plaintiff in this action was Minor.

obligation to exhaust administrative remedies.[38] MWD does not challenge Minor's allegation that she exhausted her administrative remedies. In any event, as MWD did not retaliate against Minor, the fact that it failed to provide her relief for her internal grievance of retaliation is obviously not actionable.

In sum, MWD was not required to address any of these allegations in its motion for summary judgment. As MWD defeated Minor's allegations that she was improperly retaliated against, these remaining allegations, even if true, would not change the result.

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[38] Minor alleges, "In compliance with her obligation to exhaust her administrative remedies, Ms. Minor first attempted to resolve her grievances with respect to the unlawful retaliation through the internal grievance process; however, she received no relief."

DISPOSITION

The judgment is affirmed. MWD shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.